Supreme Court, U.S.
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No. 04-

In the
Supreme Court of the United States

HIEN PHI HOANG
Petitioner,

v.

JOHN ASHCROFT, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the term "aggravated felony" as defined by the INA § 101(a)(43) is impermissibly overbroad.

II. Whether the crime of accessory after the fact is a crime related to obstruction of justice in all cases.

III. Whether a federal court and/or administrative agency must always accept as conclusive the fact of the conviction record, even if all other evidence in the judicial record do not support the conviction.

IV. Whether 8 U.S.C. § 1252(a)(2)(C), which purportedly limits judicial review by the federal courts violates the Due Process Clause of Fifth Amendment to the United States Constitution.

V. Whether this case is one of those "rare cases" contemplated in Daniels v. United States.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED	3
REASON FOR GRANTING WRIT	4
STATEMENT OF THE CASE	8
ARGUMENTS	10
I. The term "aggravated felony" as defined in INA § 101(a)(43) is impermissibly overbroad	10
II. Not every offense that, by its nature, would tend to "Obstruct Justice" is an offense that should be labeled as "Obstruction of Justice"	12
III. Reviewing Courts should be allowed to look behind every plea agreement in a criminal proceeding to analyze whether the elements of the crime exist for immigration purposes	14
IV. 8 U.S.C. § 1252 is unconstitutional	

because it deprives permanent residents of procedural due process under the Fifth Amendment to the United States Constitution. 17

V. Whether this case is one of those "rare cases" contemplated in Daniels v. United States 18

CONCLUSION 18

APPENDIX

Appendix A . . . . . a

TABLE OF AUTHORITIES

Page

Aguilera-Enriquez v. INS
516 F.2d 565 (6th Cir. 1975) 17

Aptheker v. Secretary of State
378 U.S. 500 (1964) 12

Arnett v. Kennedy
416 U.S. 134 (1974) 12

Bridges v. Wixon
326 U.S. 135 (1945) 17

Daniel v. United States
532 U.S. 374 (2001) . . . . . iv, 18

Hoang v. Ashcroft
No. 03-60514(unpublished) . . . . 1, Appendix A

Longoria-Castenada v. INS
548 F.2d 233 (8th Cir. 1977) 17

Maryland v. Joseph H. Munson
467 U.S. 947 (1984) 12

Matter of Espinoza-Gonzales
23 I & N (BIA 1999) 9, 10, 12, 13

Nehme v. I.N.S.
252 F.3d 415 (5th Cir. 2001) 5

North Carolina v. Alford
400 U.S. 25 (1970) 15

Pettibone v. United States
148 U.S. 197 (1893) 14

Thornhill v. Alabama
310 U.S. 88 (1940) 12

United States v. Aquilar
515 U.S. 593 (1995) 14

United States v. Robel
389 U.S. 258 (1967) 12

Statutes and Other Citations

INA § 101(a)(43) . . . . . i, 3, 4, 12
INA § 101(a)(43)(A) 10, 11
INA § 101(a)(43)(F) 10, 12
INA § 101(a)(43)(H) 10
INA § 101(a)(43)(B) 10
INA § 101(a)(43)(G) 11
INA § 101(a)(43)(D) 11
INA § 101(a)(43)(M)(ii) 11
INA § 101(a)(43)(J) 11
INA § 101(a)(43)(D) 11
INA § 101(a)(43)(R) 11
INA § 101(a)(43)(M)(i) 11
INA § 101(a)(43)(P) 11
INA § 101(a)(43)(I) 11
INA § 101(a)(43)(K)(i) 11
INA § 101(a)(43)(E)(ii) 11

INA § 101(a)(43)(C) 11
INA § 101(a)(43)(N) 11
INA § 101(a)(43)(S) 6, 9, 10, 12, 13
INA § 237(a)(2)(A)(iii) 9
8 U.S.C. § 1252(a)(2)(C) 3, 6, 7, 18
8 U.S.C. § 1252(b)(4)(A) 3
8 U.S.C. § 1252(b)(4)(B) 17
8 U.S.C. § 1105a 17
Anti-Drug Abuse Act of 1998 . . . 4, 10
Immigration Act of 1990 4
Immigration and Nationality Technical Correction Act of 1994 4
Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 . . . . . 4, 10
Anti-Terrorism and Effective Death Penalty Act of 1996 . . . . . 4, 10
Chapter 73 title 18 . . . . . 5, 12, 13
La. Rev. Stat. Ann. § 14:25 14

Miscellaneous

Black Law Dictionary (6th Ed. 1990) . . . 13

OPINIONS BELOW

The opinion of U.S. Court of Appeals for the Fifth Circuit was entered on May 12, 2004, under the caption Hoang v. Ashcroft, No. 03-60514 (5th Cir. 2004) (unpublished). The opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 12, 2004. The Fifth Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on may 29, 2003. The former Immigration and Naturalization Service commenced removal proceedings because Petitioner had allegedly committed an aggravated felony as defined by Section 101(a)(43)(S) of the Immigration and Nationality Act.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The federal statutes involved in this case are 8 U.S.C. § 1252(a)(2)(C), and INA § 101(a)(43). This case also raises procedural due process issues under the Fifth Amendment to the United States Constitution that have not been, but should be, settled by this Honorable Court.

REASON FOR GRANTING WRIT

I. "Aggravated Felony" as defined in the INA § 101(a)(43) is impermissibly overbroad.

The term "aggravated felony" first appeared in immigration law under the Anti-Drug Abuse Act of 1988 (ADAA).[1] Under the ADAA, Congress was simply trying to create a separate grounds of deportation for serious crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices. The passage of the Immigration Act of 1990 (IMMACT 90)[2] had a profound effect on aliens convicted of aggravated felonies in that it limited discretionary relief such as 212(c) waiver, suspension of deportation, voluntary departure, asylum, and withholding of deportation. Four years later, the definition was again revised in the Immigration and Nationality Technical Correction Act of 1994 (INTCA)[3] to include common, less serious crimes such as fraud, burglary, theft, and others. However, the most sweeping changes to immigration were brought by two acts of legislation known as the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[4], and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[5] As one reflects on the

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1. Pub. L. 100-690, effective November 18, 1998.

2. Pub. L. No. 101-649, effective November 29, 1990.

3. Pub. L. No. 103-416, effective October 25, 1994

4. Pub. L. No. 104-208, effective September 30, 1996.

5. Pub. L. No. 104-132, effective April 24, 1996.

definition of aggravated felonies, an appropriate question that one is left with is "what is not an aggravated felony"?

II. The crime of accessory after the fact is not a crime relating to obstruction of justice in all cases.

Chapter 73 of title 18 collectively lists a series of offenses under the tile of "Obstruction of Justice," and it does not include the crime of accessory after the fact. A person convicted of an accessory after the fact may or may not obstruct justice, and it can be determined on a case-by-case basis. Accessory after the fact cannot be categorically termed "obstruction of justice" in all case.

III. The federal courts should not take the fact of conviction as conclusive, when the plea that led to the conviction was involuntary and void of due process.

This Honorable Court has fully acknowledged that the criminal law system in the United States is not a perfect system. Often times innocent people get arrested because they were at the wrong place at the wrong time and charged with a crime they did not commit, and the duty is put into the hands of the defending attorney to sort things out. This Honorable Court has also acknowledged that a great majority of criminal cases in the United States are disposed of by plea of guilty rather than by trial, and unfortunately, innocent defendants routinely plea guilty to a crime they did not commit to avoid the dangers of going to trial on the crimes charged. It is not uncommon that an innocent person plea to a lesser charge than to risk being convicted of a crime for which he could receive a life sentence.

Many of these people cannot fully contemplate the

collateral consequences of a guilty plea, and for those innocent persons who are only permanent residents, the collateral consequence can be quite drastic–deportation. It is also unfortunate that many defense attorneys do not have the background in immigration law to fully comprehend the collateral consequence of a guilty plea for permanent residents until it is too late.

IV. 8 U.S.C. § 1252(a)(2)(C) is unconstitutional because it violates the due process clause of the Fifth Amendment to the United States Constitution.

The Department of Homeland Security routinely detains permanent residents and initiates removal proceedings against them for crimes that they may or may not have committed ten, fifteen, or twenty years after post conviction relief has expired. By that time, the federal courts are barred from hearing habeas corpus proceedings because of the lapse of time or because the person is no longer "in custody." At the removal proceedings, the Immigration Judges do not look at the reason why the person pled to such and such a crime. They only review the record of conviction and deport permanent residents based on the conviction. The Board of Immigration Appeals does not look behind the conviction to see why a person pled to such and such a crime; the Board only looks at the conviction record and affirms the ruling of the Immigration Judge. The Courts of Appeals are barred by 8 U.S.C. § 1252(a)(2)(C) from reviewing cases that fall under the category of "aggravated felony" as defined by Section 101(a)(43)(S) of the Immigration and Nationality Act. Yet, for many permanent residents, the only form of relief available against deportation is to request the reviewing court to look behind the conviction to see whether the person did in fact commit such a crime. As such, if 8

U.S.C. § 1252(a)(2)(C) bars reviewing courts from looking behind the conviction record, then it is unconstitutional in violation of due process of law.

V. This case is one of those "rare cases" contemplated in Daniels v. United States.

In denying the Petitioner the opportunity to collaterally attack his conviction, the US Fifth Circuit Court of Appeals failed to comply with the ruling of this Court in Daniels v. United States, 532 U.S. 374 (2001).

Accordingly, Petitioner respectfully requests that the Court grant him writ of certiorari.

STATEMENT OF THE CASE

The Petitioner, Hien Phi Hoang, is a native of Vietnam and a citizen of Vietnam. On September 20, 1990, he was admitted into the United States under the Amerasian Program at Los Angeles, California, as an AM-3 immigrant.

On or about Friday the 27th day of June, 1997, the Petitioner and his friend, Thach Nguyen, were playing pool in a pool hall on Florida Street in Baton Rouge, Louisiana, when they met two of Thach's friends, Tuan Tran and Tuan's brother, Trung Tran. The Petitioner had never met the Trans before this date. After playing pool, the Petitioner and the three above mentioned Vietnamese decided to go to a dancing club. The four young men went to the club in two different vehicles: Tuan Tran and his brother drove to the club in a white four-door Oldsmobile, while the Petitioner and Thach Nguyen went to the club in a blue Ford Station Wagon. The Petitioner and the three Vietnamese entered the club and occupied four chairs located near the dance floor. At some point, words were exchanged between Christopher McDaniel, the victim, and one or more of the Vietnamese. Suddenly, one of the Vietnamese threw a cue ball at McDaniel and a fight ensued between Tuan Tran and Christopher McDaniel, which resulted in the stabbing death of McDaniel. The manager at the club quickly broke up the fight, and the four Vietnamese left the scene. The Petitioner claimed that as they were leaving the club after the fight, Tuan Tran told him that he had stabbed Christopher McDaniel, but the Petitioner thought that Tuan Tran was only joking.

According to Tuan Tran's statement to the police, the Petitioner and Thach Nguyen left the club in Hien Hoang's car and then went home. He and his brother, Trung Tran, went back to the pool hall in a separate car, played pool, and eventually went back to their house to sleep. The next day,

Tuan Tran and his brother, Trung Tran, left Baton Rouge with Tuan's wife to go to their parent's home in Houston.

On or about July 20, 1997, Hien Hoang went to Houston for a Church Convention. The Petitioner then found out from his family that the New Orleans Police Department was looking for him for questioning. The Petitioner made arrangements to leave for New Orleans the next day, but before he could do so, the Houston Police Department arrested him. The arrest was made without incident, and the Petitioner voluntarily provide a statement to the police. The Petitioner was then extradited back to Louisiana, where Baton Rouge Police Department charged The Petitioner and the other three Vietnamese in the bar with the second degree murder of Christopher McDaniel. The Petitioner emphatically asserted his innocence, but under the advisement of counsel, he accepted to the plea of accessory after the fact and assisted in the conviction of the stabber, Mr. Tuan Tran. At the Petitioner's sentencing hearing, the trial judge sentenced him to one year imprisonment, gave him credit for time served, and released him.

On August 23, 2000, the Immigration and Naturalization Service (hereinafter "INS"), initiated removal proceedings against the Petitioner under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (hereinafter "INA") on the contention that a conviction for accessory after the fact is within the aggravated felony definition at section 101(a)(43)(S) of the INA relating to obstruction of justice, perjury, or subornation of perjury. The Petitioner denied the charged of removability, but the Immigration Judge ruled against the Petitioner and ordered him removed from the United States citing the Board's precedent decision in Matter of Batista-Hernandez, 21 I. & N. Dec. 955 (BIA 1997).

Petitioner timely filed an appeal to the BIA claiming that the immigration judge wrongly ruled that his conviction

constituted an aggravated felony in light of the BIA's decision in Matter of Espinoza-Gonzales, 22 I. & N. Dec. 889 (BIA 1999), available at 1999 WL 378088. On May 29, 2003, the BIA denied Petitioner's appeal without separate opinion. Petitioner then timely filed a petition for review before the US Fifth Circuit Court of Appeals requesting that this Court review the records of the criminal proceedings in connection with the Petitioner's conviction to see that the Petitioner did not in-fact obstructed justice. On May 12, 2004, the Petition for Review to the US Fifth Circuit denied review for lack of jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(C).

ARGUMENT

I. The term of "aggravated felony" as defined in INA § 101(a)(43) is impermissibly overbroad.

The term "aggravated felony" has undergone through many changes and revisions since it was first introduced in the ADAA. The term reached its climatic impact with respect to permanent residents under the AEDPA and IIRAIRA. Now aggravated felonies include the following convictions, the list of which is not meant to be exhaustive:

1. Murder (INA § 101(a)(43)(A));
2. Crime of Violence for which a sentence of 1 year or longer has been imposed (INA § 101(a)(43)(F));
3. Demand for receipt of ransom ((INA § 101(a)(43)(H));
4. Drug crimes ((INA § 101(a)(43)(B));
5. Theft offenses for which a sentence of 1 year or longer has been imposed ((INA §

101(a)(43)(G));

6. Money laundering and related offenses for which the amount if over $10,000 ((INA § 101(a)(43)(D));
7. Tax evasion ((INA § 101(a)(43)(M)(ii));
8. Gambling offenses for which a sentence of 1 year or longer was imposed ((INA § 101(a)(43)(J));
9. Trafficking of vehicles with altered identification numbers for which a sentence of 1 year or longer was imposed ((INA § 101(a)(43)(R));
10. Offense involving fraud or deceit ((INA § 101(a)(43)(M)(i));
11. Commercial bribery, counterfeiting or forgery ((INA § 101(a)(43)(R));
12. False or fraudulent US passport for which a 1 year sentence has been imposed ((INA § 101(a)(43)(P));
13. Rape (INA § 101(a)(43)(A));
14. Sexual abuse of minor (INA § 101(a)(43)(A));
15. Child pornography (INA § 101(a)(43)(I));
16. Prostitution business (INA § 101(a)(43)(K)(i));
17. Transportation for the purpose of prostitution (INA § 101(a)(43)(K)(ii));
18. Unlawful possession of firearm (INA § 101(a)(43)(E)(ii) or (iii));
19. Unlawful trafficking of firearms, explosive materials or destructive devices (INA § 101(a)(43)(C));
20. Alien smuggling (INA § 101(a)(43)(N));
21. Obstruction of justice, perjury, or bribery of a witness for which the underlying charge carries possible sentence of 2 years or more ((INA §

101(a)(43)(S)).

The list goes on and on. The problem lies in the construction of the definition of aggravated felony as defined in INA § 101(a)(43). In one acclaim case that appeared in the Atlanta Journal Constitution on June 12, 1998, a Nigerian woman was ordered deported for a shoplifting a $15.00 baby outfit. Battery and drunk driving convictions have been adjudicated by the INS under INA § 101(a)(43)(F) as aggravated felonies.

The definition of "aggravated felony" as defined in the INA is unconstitutional because it too broadly and indiscriminately involves convictions that may not have been intended by Congress. This Court has routinely ruled a statute is being overbroad because it indiscriminately restricts individual rights. See Aptheker v. Secretary of State, 378 U.S. 500 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940); Arnett v. Kennedy, 416 U.S. 134 (1974); Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); U.S. v. Robel, 389 U.S. 258 (1967). Like the above mentioned cases, this Court should rule that the term "aggravated felony" as defined in the INA is impermissibly overbroad.

II. Not every offense that, by its nature, would tend to "Obstruct justice" is an offense that should be labeled as "obstruction of justice."

The United States Code failed to define "obstruction of justice," or "obstructing justice"; instead, Chapter 73 of title 18 collectively lists a series of offenses under the tile of "Obstruction of Justice." Matter of Espinoza-Gonzales 23 I & N (BIA 1999). Under this title, obstruction of justice crimes include such crimes as perjury, bribery, interference in

investigation of financial transactions, jury tampering, and threatening or intimidation of witnesses.[6] Id. Black Law Dictionary defines obstructing justice as "[i]mpeding or obstructing those who seek justice in a court, or those who have duties or power of administering justice therein. The act by which one or more persons attempt to prevent, or do prevent, the execution of lawful process." Black Law Dictionary 1077 (6th ed. 1990), quoting from, Espinoza-Gonzales, supra. In drafting the Immigration Naturalization Act, Congress used the phrase, "an offense relating to obstruction of justice, perjury or subordination of perjury, or bribery of a witness," to designate relevant crimes as aggravated felonies. Immigration Naturalization Act, § 101(a)(43)(S), quoting from, Espinoza-Gonzales. Thus, Congress did not employ a generic descriptive

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6. Chapter 73 lists the following as Obstruction of Justice offenses: Assault on process server (§ 1501); Resistance to extradition agent (§ 1502); Influencing or injuring officer or juror generally (§ 1503); Influencing juror by writing (§ 1504); Obstruction of proceedings before departments, agencies, and committees (§ 1505); Theft or alteration of record or process; false bail (§ 1506); Picketing or parading (§ 1507); Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting (§ 1508); Obstruction of court orders (§ 1509); Obstruction of criminal investigations (§ 1510); Obstruction of State or local law enforcement (§ 1511); Tampering with a witness, victim, or an informant (§ 1512); Retaliating against a witness, victim, or an informant (§ 1513); Civil action to restrain harassment of a victim or witness (§ 1514); Obstruction of Federal audit (§ 1516); Obstructing examination of financial institution (§ 1517); Obstruction of criminal investigations of health care offenses (§ 1518).

phrase such as "obstructing justice," or "obstruct justice," but chose instead to relate "Obstruction of Justice" with crimes that are clearly associated with the affirmative obstruction of a proceeding or investigation. Id. Moreover, the United States Supreme Court in Pettibone v. United States, 148 U.S. 197, 206 (1893), held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." Pettibone v. United States, 148 U.S. 197 (1893), quoting from, United States v. Aguilar, 515 U.S. 593, 599 (1995). The Court in Pettitbone reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct. Id.

III. Reviewing Courts should be allowed to look behind every plea agreement in a criminal proceeding to analyze whether the elements of the crime exist for immigration purposes.

The Bureau of Citizenship and Immigration Services (hereinafter shall be referred to as "B.C.I.S.") wants this court to categorically designate every accessory after the fact plea as an aggravated felony. Under Louisiana criminal law, an accessory after the fact is defined as: "[a]ny person who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction, or punishment. La. Rev. Stat. Ann. § 14:25. This definition of accessory after the fact relates to obstruction of justice, but the Petitioner asks this Court to go further, to look behind his accessory after the fact conviction to see whether he actually obstructed justice.

As this Court undoubtedly acknowledges, many

innocent people are subjected to criminal proceedings for being at the wrong place at the wrong time. To avoid the risks of trial and being convicted for a crime that he or she did not commit, many opted to reach a plea with the State out of the fear of conviction and/or out of convenience.

A famous case to reach the U.S. Supreme Court in connection with plea bargaining is North Carolina v. Alford, 400 U.S. 25, (1970). In Alford, the Appellee was indicted for first-degree murder, a capital crime in North Carolina, and the penalty could be death if he were to be found guilty by a jury. Alford, 400 U.S. at 27-28. Faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence, Appellee's attorney recommended that Appellee accept of guilty plea to second-degree murder, and was sentenced to 30 years' imprisonment. Id. The Court of Appeals for the Fourth Circuit, on an appeal from a denial of a writ of habeas corpus, found that appellee's guilty plea was involuntary because it was motivated principally by fear of the death sentence. Id. at 30. The U.S. Supreme Court, with Justice White delivering the opinion of the Court, found that the plea entered was voluntary in light of the fact of the of the overwhelming evidence against him and that the trial judge did not commit constitutional error in accepting it. Id. at 38.

Unlike the appellee in Alford, there was no evidence to convict the Petitioner of being an accessory after the fact to second degree murder. The Petitioner testified in court that he had never met Tuan Tran before the night of the incident; that he and his friends, Thach Nguyen, went to the dancing club on separate cars; that after the fight was broken up by the club manager they left on separate cars; that there were minimal or no communication between the Petitioner and Tuan Tran after the incident; that the Petitioner and Tuan Tran left for Houston at two different times, in different vehicles, and for absolutely

different reasons; and he even testified in court to convict Tuan Tran, and in the process pleaded his own innocence.

Furthermore, there is no evidence in the record to show that the Petitioner: committed perjury, bribed anyone, interfered with the investigation of police officers, tampered with the jury, or threatened or intimidated witnesses. As a matter of fact, the arresting officer testified that the Petitioner was arrested without incident, and that he voluntarily provided a statement to the police to help convict Tuan Tran.

Tuan Tran in his statement to the police also acknowledged that he did not know the Petitioner before the night of the incident; that they went to the club in separate cars; that they left the club in separate cars; that they never met up again after the incident; and that he left for Houston on his own accord. Thus, in this case, not only is there no intent to obstruct justice, there is absolutely no evidence to suggest that the Petitioner was an accessory after the fact.

The Trial Court Judge hearing the case also acknowledged that the plea entered by the Petitioner was simply a plea of convenience because she only sentenced him to one year imprisonment out of the possible five years and ordered his release.

In light of this overwhelming evidence, this Court cannot shut its eyes on the facts and simply look at the conviction to decide that the Petitioner obstructed justice. Constitutional Due Process would require that this Honorable Court look behind the conviction and reach the conclusion that the Petitioner did not obstruct justice, and that his plea of being an accessory after the fact cannot constitute an aggravated felony for immigration purposes.

IV. By barring courts to review crimes that have been adjudicated as an "aggravated felony" 8 U.S.C. § 1252(a)(2)(C) is unconstitutional because it deprives permanent residents of procedural due process under the Fifth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution states, in pertinent parts: " No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." The U.S. Supreme Court succinctly states the reality of deportation: "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty–at times a most serious one–cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135, 154 (1945). Because deportation is a penalty, all necessary steps must be taken to provide resident aliens with procedural due process. It is a long held practice that immigration authorities must look to the judicial record, and may not go behind it to make an independent determination of guilt or innocence. See Aguilera-Enriquez v. INS, 516 F.2d 565, 570 (6th Cir. 1975); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir. 1977). The standards for review are set by statute which provides that the findings of fact by the immigration judge must be accepted as valid and conclusive if they are supported by reasonable, substantial and probative evidence. See 8 U.S.C. § 1105a, § 1252(b)(4)(B).

In the case at bar, the only evidence that would lead the Immigration Judge to conclude that the Petitioner had in fact committed the crime of accessory after the fact is the plea

recorded in the conviction record. All other evidence--statements to the police, hearing on motions, the defendant's actions–point to the fact that the Petitioner did not commit the said crime. It is true in this case, as with many related cases, the only forum in which an alien can attack his conviction is in immigration proceedings. All other channels of review have expired and/or not applicable. Because 8 U.S.C. § 1252(a)(2)(C) deprives the reviewing federal courts of jurisdiction to review convictions that are deprived of due process, it is unconstitutional.

V. This case is one of those "rare" cases contemplated in Daniels v. United States.

In Daniel V. United States, 532 U.S. 374 (2001), this Honorable Court provides an opportunity to collaterally attack a state conviction when no channel of review was actually available to the defendant due to no fault of his own. In the case at bar, the Petitioner pleaded to accessory after the fact under the advice of counsel even though all the evidence points to his innocence. In denying the Petitioner the opportunity to collaterally attack his conviction, the US Fifth Circuit Court of Appeals failed to comply with the ruling of this Court.

CONCLUSION

In conclusion, the claims raised by this Petition for Writ of Certiorari request this court to decid: 1) whether the term "aggravated felony" as defined in the INA is impermissibly overbroad; 2) whether the crime of accessory after the fact is a crime related to obstruction of justice for all cases; 3) whether a federal court and/or administrative agency must always accept as conclusive the fact of the conviction record, even if all other

evidence in the judicial record do not support the conviction; 4) whether 8 U.S.C. § 1252(a)(2)(C), which bars review for crimes that have been determined to be "aggravated felonies" by the court of appeals, violates the Due Process Clause of Fifth Amendment; and 5) whether this is one of those rare cases in which collateral attack on the state conviction should be granted. These are issues that this Court has not addressed, therefore, a writ of certiorari should be granted in this case.

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No. 04- _____

In the
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HIEN PHI HOANG
Petitioner,

v.

JOHN ASHCROFT, Attorney General,
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Appendix

1. May 12, 2004, Ruling of the US Fifth Circuit Court of Appeals.

2. May 23, 2003, Ruling of the Board of Immigration Appeals.

3. October 11, 2001, Ruling of the Executive Office for Immigration Review.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-605-14
Summary Calendar

HIEN PHI HOANG

Petitioner

versus

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A42 360 369

Before BARKSDALE, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM: [1]

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1 Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.54.

Hien Phi Hoang appeals the Board of Immigration Appeals' final order of removal for having been convicted of an aggravated felony for which a sentence of at least one year was imposed. Hoang pleaded guilty in 1998 to the Louisiana crime of being an accessory after the fact, argues that this court should look beyond the fact of conviction and the definition of the offense to determine whether he actually committed an aggravated felony. However, this court does no allow the review of immigration proceedings to be used as a forum for collateral attacks on related convictions. See Howard v. INS, 930 F.2d 432, 434-35 (5th Cir. 1991); Zinnanti v. INS, 651 F.2d 420, 421 (5th Cir. 1981). Because Hoang was convicted of an aggravated felony, this court lacks jurisdiction over his petition. See Mehme v. INS, 252 F.3d 415, 420, 433 (5th Cir. 2001). The petition is DISMISSED.

The Respondent has filed a motion for summary affirmance of the BIA's decision. That motion is DENIED as UNNECESSARY. Petitioner's motion to amend is DENIED as MOOT.

PETITION FOR REVIEW DISMISSED; MOTIONS DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A42-360-369 - New Orleans Date: May 29, 2003

In re: HOANG, HIEN PHI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Adams, Thomas P.

ON BEHALF OF SERVICE: Manuel Ramirez,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below, is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New Orleans, Louisiana

File A 42 360 369 October 11, 2001

In the Matter of

HIEN PHI HOANG,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	
	)	

CHARGE: Section 237(a)(2)(A)(II) of the Immigration and Nationality Act; an alien convicted of an aggravated felony as defined in Section 101(a)(43)(S) of the Act.

APPLICATION: Withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act and withholding of removal under Article 3 of the Convention Against Torture.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Thomas P. Adams	Manuel Ramirez
631 St. Charles Ave.	Assistant District Counsel
New Orleans, LA 70130	Immigration and Naturalization

Service
New Orleans, LA 70113

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a male, native and citizen of Vietnam who was admitted to the United States as an immigrant on September 20, 1990. On May 26, 1998, he was convicted in the state of Louisiana of the offense of accessory after the fact to second degree murder. As a result of the conviction, he was sentenced to prison for one year.

In pleading to the Notice to Appear, counsel for the respondent admitted all of the allegations of fact contained therein, but denied the charge. An Immigration Judge found the charge to be sustained; See Matter of Batista, Int. Dec. 3321 (BIA 1997). As relief from removal, the respondent applied for withholding of removal under Section 241(b)(3) of the Act, and Article 3 of the Convention Against Torture.

Section 241(b)(3) of the Act provides that the Attorney General may not remove an alien to a country of the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. The burden of proof is on the applicant for withholding of removal to establish that his or her life or freedom would be threatened in the proposed country of removal on account of one of the five reasons set forth above; 8 C.F.R. 208.16(b). The applicant's life or freedom shall be found to be threatened if it is more likely than not that he or she would be persecuted; 8 C.F.R. 208.16(b)(1).

8 C.F.R. 208.16(c)(2) provides that the burden of proof is on the applicant for withholding or removal under the Convention Against Torture to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.

In the instant case, the respondent fears persecution and torture because his father was a paratrooper for the South Vietnamese Army, and his mother was a receptionist for the South Vietnamese police force. The record shows that the respondent's parents were treated harshly by the Communist Government shortly after the revolution. It also shows that they were undisturbed by the government for the last 11 years before coming to the United States. Accordingly, I cannot find it more likely than not that the respondent will be persecuted or tortured, particularly in light of the fact that his mother returned to Vietnam, without incident, for two months in 1993.

ORDER

IT IS ORDERED that the respondent's application for withholding of removal under Section 241(b)(3) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Article 3 of the Convention Against Torture be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Australia on the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that if the above named country declines to accept the respondent into its territory or fails to respond to the Services initial inquiry within 30 days,

then the respondent shall be removed to Vietnam.

CHARLES W. WIEGAND, III
Immigration Judge